FILED
JUN 16 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

BLOSENSKI DISPOSAL SERVICE,
Petitioner

VS.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL RESOURCES,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

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QUESTIONS PRESENTED FOR REVIEW

I. Where an agent of the Pennsylvania Department of Environmental Resources enters and makes a warrantless search of petitioner's non-hazardous waste transfer station building without probable cause, and while in the process of said search, he informs the petitioner of his purpose for being in said property and petitioner merely walks away, may the search be justified as a consentual search or on the basis of the open fields doctrine?

II. Does the "good faith" doctrine apply to a situation where an agent of the Pennsylvania Department of Environmental Resources conducts a warrantless search of petitioner's non-hazardous waste transfer station building without probable cause in accordance with a warrantless inspection statute found unconstitutional because it lacks any regulations defining the circumstances

under which such inspection of non-hazardous waste can be conducted so as to preclude the use of the Fourth Amendment Exclusionary Rule as applied to the states through the due process clause of the Fourteenth Amendment?

LIST OF ALL PARTIES TO THE PROCEEDINGS

The caption of the case to This Honorable Court contains the name of all parties.

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REFERENCE TO OPINIONS BELOW

I. SUPREME COURT OF PENNSYLVANIA

This case has not been reported in the Official Reporter or the Unofficial Atlantic Reporter.

II. THE COMMONWEALTH COURT OF PENNSYLVANIA

Official citations 116 Commonwealth Court 312 (1988)

West Reporter 543 A.2d 159 (1988)

III. COMMON PLEAS COURT OF CHESTER COUNTY

This case has not been reported in the Official Reporter of Chester County nor has it been reported in the Unofficial District and County Reporter.

JURISDICTION

1. The Order of the Supreme Court of Pennsylvania denying the Petitioner's Application for Reconsideration of Denial of Petition for Allowance of Appeal was entered on April 18, 1989 (Appendix A). It is final by its terms.

2. The federal question was presented as indicated at pages 16, 18 and 19, infra. The excerpts from the records showing the raising of the federal questions are set out in Appendices D, J.

3. The jurisdiction of this Court is invoked under 28 U.S.C.A. §1257(a), since the judgments below have infringed rights, privileges and immunities specially set up and claimed under the constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States, U.S.C.A. Const. Amend. 4, provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall be issued, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the Constitution of the United States, U.S.C.A. Const. Amend. 14, §1, provides as follows:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 608 of the Solid Waste Management Act of 1980, 35 Pa. C.S.A. §6018.608, reads as follows:

> Section 608. Production of materials; record keeping requirements; rights of entry; the department and its agent and employees shall:
>
> (1) have access to, and require production of, books and papers, documents, and physical evidence pertinent to any matter under investigation.
>
> (2) require any person or municipality engaged in the storage, transportation, processing, treatment or disposal of any solid waste to establish and maintain such records and make such reports and furnish such information as the department may prescribe.
>
> (3) enter any building, property, premis or place where solid waste is generated, stored, processed, treated or disposed of for the purposes of making such investigation or inspection as may be necessary to ascertain the compliance or non-compliance by any person or municipality with the provisions of this Act and the Rules or Regulations promulgated hereunder. In connection with such inspectional investigation, samples may be taken of any solid, semi-solid, liquid or

contained gaseous material for analysis. If any analysis is made of such samples, a copy of the results of the analysis shall be furnished within five (5) business days to the person having apparent authority over the building, property, premises or place.
1980, July 7, P.L. 380, No. 97, §608, effective in sixty (60) days.

Section 609 of the Solid Waste Management Act of 1980, 35 Pa. C.S.A. §6018.609, provides as follows:

Section 609 - Search Warrants.

An agent or employee of the Department may apply for a search warrant to any Commonwealth official authorized to issue a search warrant for the purposes of inspecting or examining any property, building, premis, place, book, record or other physical evidence of conducting tests, or of taking samples of any solid waste. Such warrant shall be issued upon probable cause. It shall be sufficient probable cause to show any of the following:

(1) that the inspection, examination, test, or sampling is pursuant to a general administrative plan to determine compliance with this Act;

(2) that the agent or employee has reason to believe that a violation of this Act has occurred or may occur; or

(3) that the agent or employee has been refused access to the property, building, premis, place, book, record, or physical evidence, or has been prevented from conducting tests or taking samples. 1980, July 7, P.L. 380, No. 97, §609, effective in sixty (60) days.

Section 610 of Solid Waste Management Act of 1980, 35 Pa. C.S.A. §6018.610, provides, in pertinent part, as follows:

Section 610 - Unlawful Conduct

It shall be unlawful for any person or municipality to:

(1) ...

(2) construct, alter, operate or utilize a solid waste storage, treatment, processing or disposal facility without a permit from the department as required by this Act or violation of the Rules or Regulations adopted under this Act, or orders of the department, or in violation of any term or condition of any permit issued by the department.

(3) ...

(4) store, collect, transport, process, treat, or dispose of, or assist in the storage, collection, transportation, processing, treatment, or disposal of, solid waste contrary to the Rules or Regulations adopted under this Act, or orders of the department, or any term or any condition of any permit, or in any manner as to create a public nuisance or to adversely effect the public health, safety, and welfare.

(5) ...

(6) ...

(7) ...

(8) ...

(9) ...

1980, July 7, P.L. 380, No. 97, §610, effective in sixty (60) days.

STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

On July 7, 1981, agent Frank Holmes, from the Commonwealth of Pennsylvania, Department of Environmental Resources, went to the site of a building in Chester County, Pennsylvania, which he thought might be operating as an unpermitted trash transfer station (Appendix I, p. 17a). The agent's suspicions were based on the fact that he observed a trash truck back up a ramp into that building more than thirty (30) days previous to July 7, 1981. (ID., p. 48a).

On July 7, 1981, agent Holmes at approximately 1:15 p.m., drove onto private property and pulled up the ramp leading to the compactor building. (ID., pp. 16a, 19a). Agent Holmes exited his car and as he proceeded up the ramp to the building, he noticed several people stop activity and come to the front of the truck which was in the building. (ID., p. 37a). The agent continued into the building

and looked into the back of the truck and also into the compactor hopper. (ID., p. 45a). Agent Holmes noticed trash down inside of the compactor and also trash in the back of the truck. (ID., p. 20a).

After the agent had been in the building a few minutes, Joseph Blosenski, Jr., who is the owner of petitioner, Blosenski Disposal Service, arrived and asked agent Holmes what he was doing. Agent Holmes explained to him that he was there to make sure that the transfer station was not in operation. Mr. Blosenski replied "is that all?". Agent Holmes replied "yes" and Blosenski left without making any further comment. (ID., p. 39a). Agent Holmes shortly thereafter left the building. (ID., p. 39a).

Based on agent Holmes's observation in the commercial building without benefit of probable cause or a warrant, two criminal citations were filed on September 28, 1981 charging the

petitioner with violations of the Pennsylvania Solid Waste Management Act, §610(2) and (4). 35 P.S. §6018.610(2), (4).

B. PROCEEDINGS IN THE COURTS BELOW

The petitioner filed a pre-trial motion to suppress the evidence based on agent Holmes's search without probable cause. (Appendix J).

The Common Pleas Court of Chester County denied petitioner's suppression motion and found petitioner guilty on both citations. Petitioner filed post-trial motions alleging, inter alia, that the Trial Court erred, failing to suppress the testimony of agent Frank Holmes, resulting from an unlawful search without probable cause or warrant. (Appendix G). The Department of Environmental Resources argued that the search was valid pursuant to §608(3) of the Solid Waste Management Act of 1980.

Prior to the Trial Court's deciding the post-trial motions in this case, the

Pennsylvania Supreme Court in Commonwealth vs. Lutz, 512 Pa. 192, 516 A.2d 339 (1986), reversed by Your Honorable Court and remanded back to the Pennsylvania Supreme Court to reconsider in light of United States vs. Dunn, 480 U.S. 294 (1987), Pennsylvania vs. Lutz, 480 U.S. 920 (1987), held that warrantless searches of non-hazardous solid waste sites are unreasonable and that §608 of the Solid Waste Management Act violates the constitutional provisions against unreasonable searches and seizures to the extent that the Act authorizes said unwarranted searches. The Trial Court, in denying the petitioner's post-trial motions, acknowledged that §608 of the Solid Waste Management Act was unconstitutional in light of Commonwealth vs. Lutz. However, the Trial Court found that petitioner had consented to the unwarranted search, and therefore, there was no Fourth Amendment violation. (Appendix G, Opinion, p. 6).

The petitioner appealed to the Commonwealth Court of Pennsylvania. On May 24, 1988, the Commonwealth Court affirmed the Order of the Common Pleas Court of Chester County. In their opinion, the Commonwealth Court did not address the consent justification by the Lower Court, but rather determined that agent Holmes acted in an objective, reasonable reliance upon a state statute authorizing warrantless administrative searches in accordance with Illinois vs. Krull, 480 U.S. 340 (1987), and alternatively, that agent Holmes made naked-eye observations after entering onto a large tract of land into a building but without entry into the building similar to the factual situation in United States vs. Dunn, 480 U.S. 294 (1987). (Appendix D, Opinion, pp. 5-8).

The petitioner filed an Application for Reargument alleging, inter alia, that the Commonwealth Court acted improperly in raising

the "good faith" argument, sua sponte, and also raised the issue why a good faith exception to the exclusionary rule should not apply in this case. (Appendix D). The Commonwealth Court of Pennsylvania denied the petitioner's Application for Reargument on July 28, 1988. (Appendix C).

The petitioner then filed a Petition for Allowance of Appeal with the Pennsylvania Supreme Court raising, inter alia, the same issues that are now being raised before Your Honorable Court. The Pennsylvania Supreme Court denied the Petition for Allowance of Appeal in a per curium Order dated December 30, 1988. (Appendix B).

The petitioner filed an Application for Reconsideration of Denial of Petition for Allowance of Appeal with the Pennsylvania Supreme Court which was also denied by that said Court on April 18, 1989. (Appendix A).

CONCISE STATEMENTS FOR REASONS RELIED ON FOR THE ALLOWANCE OF WRIT

I. THE WARRANTLESS SEARCH IN THE BUILDING WITHOUT PROBABLE CAUSE MAY NOT BE JUSTIFIED AS A CONSENTUAL SEARCH OR ON THE BASIS OF THE OPEN FIELDS DOCTRINE.

In this case, there is no question that when agent Holmes entered the private property on July 7, 1981, he did not have a warrant, nor did he have probable cause that criminal activity was afoot. Agent Holmes only suspected that one of the buildings on the property was being used as an illegal transfer station because he had observed a trash truck backing up into the building on a prior occasion, more than thirty (30) days before July 7.

The Trial Court attempted to justify this search by stating that it was a consentual search. When consent is the alleged

justification for a search, the burden is on the government to demonstrate that "the consent was, in fact, freely and voluntarily given". Bumper vs. North Carolina, 391 U.S. 543, 548 (1968). See also, Johnson vs. United States, 333 U.S. 10 (1948). The issue of whether consent has been voluntarily given is a question of fact which must be determined in each case from the totality of the circumstances. Schneckloth vs. Bustamonte, 412 U.S. 218 (1973). However, "this burden cannot be discharged by showing no more than acquiessence to a claim of lawful authority". Bumper vs. North Carolina, Supra. at 548-549. In Bumper, Your Honorable Court stated that a search conducted on reliance upon an invalid warrant cannot later be justified on the basis of consent. Likewise, a search based on an unconstitutional statute, cannot be justified on the basis of consent.

Moreover, in the present case, the alleged consent took place after the entry and search was a fait accompli. Also, the petitioner never made a verbal statement that he consented to said search. He merely ascertained the reason for the agent's presence and then left the area. Given the situation, petitioner's response to the agent's stated purpose for being in the transfer building is not an affirmative consent and fails to indicate conduct or words implying a free and voluntary consent to said search.

The Commonwealth, on the other hand, has made the argument that a search warrant was not required because agent Holmes's observations were made from an area not protected by the Fourth Amendment pursuant to the "open fields" doctrine. It is the Commonwealth's theory that because the ramp where agent Holmes parked, led to an open compactor building and that the

entrance to the compactor building had no front door, the compactor building constituted open fields. The Commonwealth Court, as an alternative to its "good faith" holding, agreed that agent Holmes's actions cannot be held unconstitutional in light of United States vs. Dunn, Supra. The Commonwealth Court stated that the facts in this case were the same as in Dunn because they both involved entry onto a large tract of land and naked-eye observations of illegal activity within a building and the observations were made without entry into the building.

It is respectfully submitted that the open fields doctrine has no application whatsoever to the facts of this case. While it is true that the ramp led right up into the building without a door, the critical point is that no illegal activity was observed from outside the building. Agent Holmes had to physically enter

the confines of the building before he observed any illegal activity. Therefore, unlike in Dunn, the observations were not made from an area which is not protected by the Fourth Amendment. Instead, the observations were made within a commercial building, which area is protected by the Fourth Amendment. Marshall vs. Barlow's, Inc., 436 U.S. 307 (1978). As Your Honorable Court has ruled:

> "the business man, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. This business man, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant" See vs. City of Seattle, 387 U.S. 541, 543 (1967).

Because agent Holmes was in a constitutionally protected area when he viewed the unlawful activity, the evidence should have been suppressed unless the "good faith"

exception to the exclusionary rule applies. See Coolidge vs. New Hampshire, 403 U.S. 443 (1971).

II. THE "GOOD FAITH" EXCEPTION TO THE EXCLUSIONARY RULE SHOULD NOT APPLY TO THIS CASE BECAUSE THE WARRANTLESS INSPECTION PROVISION OF THE SOLID WASTE MANAGEMENT ACT, WHICH THE AGENT FOR THE PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES RELIED UPON IN CONDUCTING HIS WARRANTLESS SEARCH OF PETITIONER'S BUILDING, WAS BLATANTLY UNCONSTITUTIONAL AND THE AGENT SHOULD HAVE KNOWN THAT THE STATUTE WAS UNCONSTITUTIONAL.

In Illinois vs. Krull, 480 U.S. 340 (1987), Your Honorable Court held that the Fourth Amendment exclusionary rule does not apply to evidence obtained by police who acted in objectively reasonable reliance upon a statute authorizing warrantless adminstrative searches but which is subsequently found to

violate the Fourth Amendment. However, the Court did provide a caveat that a law enforcement officer cannot be said to have acted in "good faith" reliance upon a statute "if its provisions are such that a reasonable officer should have known that the statute was unconstitutional". Illinois vs. Krull, Supra. at 355. It is petitioner's position that at the time of the enactment of the warrantless entry provision of the Solid Waste Management Act of 1980, the decisions of Your Honorable Court involving administrative searches clearly showed that the statute was unconstitutional.

As early as 1967, Your Honorable Court determined that Fourth Amendment protections apply to commercial properties and that a warrant to search a commercial property must have, as its basis, that it is part of a general administrative plan, or there is a reason to believe that a violation has

occurred. Camara vs. Municipal Court, 387 U.S. 523 (1967); See vs. City of Seattle, Supra. On several occasions, the United States Supreme Court has held that certain warrantless administrative searches without probable cause may be constitutional. In Colonnade Catering Corp. vs. United States, 397 U.S. 72 (1970), the Court held that because of its history of pervasive regulation, the alcoholic beverage industry was subject to warrantless searches to promote federal interest in the control of the sale of alcohol. United States vs. Biswell, 406 U.S. 311 (1972), the Court held that warrantless searches under the Gun Control Act of 68 were justified because there was a comprehensive inspection scheme, a strong federal interest in gun control and only a limited threat to the privacy of the gun dealer. However, in Marshall vs. Barlow's, Inc., Supra. the Court invalidated a

warrantless inspection under §8(a) of the Occupational Safety and Health Act because there were no standards governing the searches.

These decisions make clear, that a warrant may not be constitutionally required if warrantless searches are necessary to further a regulatory scheme and the governmental regulatory presence is sufficiently comprehensive and defined so that the owner of a commercial property is aware that his property will be subject to periodic inspections undertaken for specific purposes. However, the statute and regulations adopted by appellee are devoid of such standards.

In Commonwealth vs. Lutz, 512 Pa. 192, 516 A.2d 339 (1986), the Pennsylvania Supreme Court concluded that the warrantless inspection provisions of the Solid Waste Management Act, 35 P.S. §6018.608(3), in the current absence of a regulation defining the circumstances under

which such inspections of non-hazardous waste will be conducted, violated the Fourth Amendment of the United States Constitution. In fact, because §608(3) and the regulations adopted by the department do not provide any sort of time table or schedule of regular inspections, Chief Justice Nix, in a concurring opinion in Commonwealth vs. Lutz, Supra., argued that the statutory provision in question was not a warrantless search provision. Justice Nix argued:

> "This sub-section merely defines the department's obligation to perform on-site investigations and inspections. It does not authorize any entry that would be violative of existing law. This is clearly evident because the very next paragraph, §609 provides for an administrative search warrant, which clearly would satisfy constitutional standards, for the carrying out of the responsibilities imposed under sub-section 608(3). The obvious question that is raised by an interpretation that would lead §608(3) as providing a blanket authority for warrantless investigations and inspections is what then would be the need for §609. Id., 512 Pa. at 209-210, 516 A.2d at 348.

Because §608(3) of the Solid Waste Management Act allowed for inspections of non-hazardous waste facilities without any regulation defining the circumstances under which such inspections would be conducted, the statute blatantly violated the Fourth Amendment of the United States Constitution. Therefore, agent Holmes could not reasonably rely on said statute when he entered petitioner's building on July 7, 1981.

Moreover, because the Commonwealth Court raised the "good faith" issue, sua sponte, in its Opinion affirming the Trial Court instead of the Department of Environmental Resources raising this issue at the Trial Court, the petitioner was deprived of the opportunity to show that agent Holmes was not acting in "good faith" reliance on §608(3) of the Solid Waste Management Act when he entered the transfer station building on July 7, 1981. In Illinois vs. Krull, Supra., Your Honorable Court stated

that "defendant has no reason not to argue that a police officer's reliance on a warrant or statute was not objectively reasonable and therefore, cannot be considered to have been in 'good faith'". Id., 480 at 354. However, in the present case, there was nothing presented in the suppression hearing or contained in the record considered by the Lower Courts upon which such an argument could be based. Obviously, respondent, who has the burden of establishing validity of the search, ought to present some evidence from which "good faith" reliance will follow in order to obligate petitioner to negate the objective "good faith" reliance by evidence or argument.

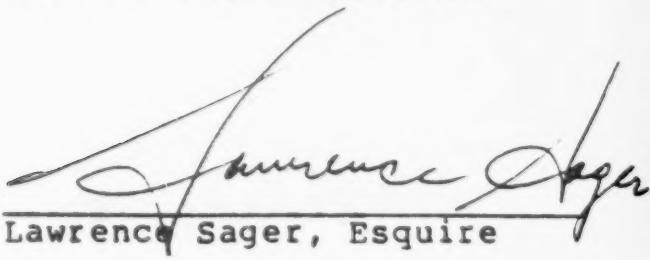
Given this situation, the petitioner requests that Your Honorable Court, at the very least, grant the Writ of Certiorari and remand this case to the Pennsylvania Supreme Court with instructions that the case should be remanded to the Trial Court for a hearing on "good faith".

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

RESPECTFULLY SUBMITTED,

SAGER & SAGER ASSOCIATES

BY: 

Lawrence Sager, Esquire

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

BLOSENSKI DISPOSAL SERVICE,
Petitioner

VS.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL RESOURCES,
Respondent

PROOF OF SERVICE

I, Lawrence Sager, Esquire, do hereby certify that I am this day, serving three true and correct copies of the Petition for Writ of Certiorari upon the following in compliance with the Rules:

By First Class, Postage Pre-Paid Mail:

Kenneth A. Gelburd, Assistant Counsel
Commonwealth of Pennsylvania
Department of Environmental Resources
Office of Chief Counsel-Eastern Region
1314 Chestnut Street - 12th Floor
Philadelphia, PA 19107-4786

SAGER & SAGER ASSOCIATES

Date: June 15, 1989 BY: Lawrence Sager
Lawrence Sager, Esquire

April 19, 1989

James A. Cunningham, Esquire
SAGER & SAGER
43 High Street
Pottstown, PA 19464

Re: Commonwealth of Pennsylvania, Department of Environmental Resources v. Blosenski Disposal Service
No. 780 E.D. Allocatur Docket 1988

Dear Mr. Cunningham:

This is to advise you that the following Order has been endorsed on your Application for Reconsideration of Denial of Petition for Allowance of Appeal, filed in the above matter:

"April 18, 1989.
Application Denied.
Per Curiam".

Very truly yours,

Marlene F. Lachman, Esquire
Prothonotary

/ma
cc: Kenneth A. Gelburd, Esquire

APPENDIX A

January 4, 1989

James A. Cunningham, Esquire
SAGER & SAGER
43 High Street
Pottstown, PA 19464

Re: Commonwealth of Pennsylvania, Department of Environmental Resources v. Blosenski Disposal Service
No. 780 E.D. ALLOCATUR DOCKET 1988

Dear Mr. Cunningham:

This is to advise you that the following Order has been endorsed on your Petition for Allowance of Appeal, filed in the above-captioned matter:

"December 30, 1988.
Petition Denied.
Per Curiam".

Very truly yours,

PATRICK TASSOS
Deputy Prothonotary

/ma
cc: Kenneth A. Gelburd, Esquire

EXHIBIT "A"

APPENDIX B

BLOSENSKI DISPOSAL SERVICE Appellant	:	IN THE COMMONWEALTH COURT OF PENNSYLVANIA
V.	:	NO. 832 C. D. 1987
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES, Apellee	:	

O R D E R

NOW, July 28, 1988, having considered appellant's application for reargument, said application is hereby denied.

BY THE COURT:

P. J.

APPENDIX C

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

BLOSENSKI DISPOSAL Appellant	: :	
VS.	:	NO. 837 C. D. 1987
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES, Appellee	: : : : : :	

APPLICATION FOR REARGUMENT

Appeal from the judgment of sentence and Order of the Court of Common Pleas of Chester County, Pennsylvania, dated March 30, 1987 as of Nos. 183 and 184-192, Summary Appeal

James A. Cunningham, Esquire
Attorney for Appellant
Attorney I.D. #17459

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Pottstown, PA 19464
(215) 323-1328

APPENDIX D

APPLICATION FOR REARGUMENT

TO THE HONORABLE, THE JUDGES OF THE SAID COURT:

9. The Order affirming judgment of the Lower Court in this case is predicated upon the holding that the agent involved in this case made a warrantless search in good faith. It is respectfully submitted that this holding was inconsistent with the facts in this case, suing the standard of "objectionable reasonableness" as required in Illinois vs. Krull, 480 U.S._____, 107 S.Ct. at 1170, 94 L.Ed. 2d at 379 (1984). The "objective reasonableness" standard requires that the agent, at the time of the search, did not have reasonable notice that the warrantless administrative search was unconstitutional. In Commonwealth vs. Lutz, 512 Pa. 192, 516 A.2d 339 (1986) a case holding that an administrative warrantless search was unconstitutional involving non-hazardous waste, our Supreme Court clearly set forth that there

was due notice of unconstitutionality of a warrantless administrative search. The Court referred to various United States Supreme Court cases that predated the search in this case. Commonwealth vs. Lutz, 512 Pa. at 199-201, 516 A.2d at 342-3, citing See vs. City of Seattle, 387 U.S. 541, 87 S.Ct. 1737, 18 L.Ed.2d 943 (1967); Camara vs. Municipal Court, 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967); Marshall vs. Barlow's, Inc., 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978).

Our Supreme Court in Commonwealth vs. Lutz, Supra., clearly established that the law of this Commonwealth at the time of the search was that a warrantless administrative search was constitutionally suspect and four factors must be considered: "First, whether the business operator is on notice that he is engaged in an activity which may subject him to warrantless searches; Second, whether the

regulation of the industry is pervasive and regular, considering the history of the regulatory scheme as a factor in this determination; Third, whether there is a strong governmental interest in the search; and Fourth, whether there are reasonable legislative or adminstrative standards governing the search". Commonwealth vs. Lutz, 512 Pa. at 201, 516 A.2d at 343. There are no facts in this record to establish the business operator was on notice that he was engaged in an activity which may subject him to warrantless searches, or whether there were reasonable legislative or adminstrative standards concerning the search. The record in this case does not support any finding or conclusion, as a matter of fact or law, using the objective reasonableness standard that the agent acted in good faith in making the warrantless search.

10. The Lower Court found that the search was not permissible under Commonwealth vs. Lutz, Supra., but that defendant had consented. The Commonwealth did not preserve the issue of validity of the search without consent; and thus, this Court should not have based its decision on an issue that was not preserved.

11. The Order reversing judgment of the Lower Court in this case was predicated upon a determination that the observations of the agent were permissible and admissible under United States vs. Dunn, _____, U.S. _____, 107 S.Ct. 1134, (1987). Recently, the Unites States Supreme Court of Pennsylvania for reconsideration in light of United States vs. Dunn. The Supreme Court of Pennsylvania, on March 21, 1988, remanded the case to the Lower Court for a determination of whether the observations were, in fact, made from "open

fields where no warrant was required". Commonwealth vs. Lutz, _____ Pa. _____, 538 A.2d 872 (1988).

12. This Court states that Dunn, as here, involved entry onto a large tract of land and naked-eye observations of illegal activities within a building; "these observations were made without entry into the building". (~~Op~~inion, p.8.). While it was true that the observations in Dunn, were made without entry into the building, the observations of the inspector in this case that trash bags were in the compacator were made while in the building and not while outside looking in as in Dunn (R.20a-21a, 44a-45a). This case is, therefore, on its facts, significantly different from Dunn and this factual distinction should, it is respectfully submitted, require exclusion of the observations.

BLOSENSKI DISPOSAL SERVICE Appellant	:	IN THE COMMONWEALTH COURT OF PENNSYLVANIA
V.	:	NO. 832 C. C. 1987
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES, Appellee	:	

BEFORE: HONORABLE DAVID W. CRAIG, Judge
HONORABLE JOSEPH T. DOYLE, Judge
HONORABLE JACOB KALISH, Senior Judge

ARGUED: February 22, 1988

APPENDIX E

OPINION BY JUDGE DOYLE FILED: May 24, 1988

Appellant next challenges agant Holmes' warrantless entry onto its property as being violative of its Fourth Amendment rights, and, as a result, Appellant asserts that Holmes' testimony should not have been permitted into evidence.[4] We do not agree.

---

[4] The following is a recitation of the facts surrounding agent Holmes' entry onto Appellant's land, as testified by agent Holmes:

> Mr. Holmes: I entered the property (by car). I--I pulled up on the--I pulled up on the--on the ramp, the access ramp to the--compactor building.
>
> ....
>
> After I had been there a few minutes in the compactor building Joseph Blosenski, Jr. arrived in his car--truck. He asked me why I was there.

And, I explained to him that I was there to make sure that the transfer station was not in operation.

He said: Is that all? I said yes. And then he just left.

(N.T. 14, 34).

It has been recognized that administrative searches are constitutional, as long as the searches are necessary to further a regulatory scheme and the regulatory presence is sufficiently comprehensive and defind so that the owner of the property would be aware that his/her property would be subject to periodic inspection. Donovan vs. Dewey, 452 U.S. 594 (1980). Such authority for searches of solid waste disposal plants comes from Section 608 of the Act.[5]

---

[5] Section 608(3) of the Act pertinently provides:

> Production of materials; recordkeeping requirements, rights of entry
>
> The department and its agents and employees shall:
>
> ....
>
> (3) Enter any building, property, premises or place where solid waste is generated, stored, processed, treated or disposed of for the purposes of making such investigation or inspection as may be necessary

> to ascertain the compliance or noncompliance by any person or municipality with the provisions of this act and the rules or regulations promulgated hereunder. In connection with such inspection or investigation, samples may be taken of any solid, semisolid, liquid or contained gaseous material for analysis....

35 P.S. §6018.608(3).

The Supreme Court has recently held in Illinois vs. Krull, 107 S.Ct. 1160 (1987), that the Fourth Amendment exclusionary rule does not apply to evidence obtained by police who acted in objective, reasonable reliance upon a state statute authorizing warrantless administrative searches, but which is subsequently found to violate the Fourth Amendment. In Krull, a Chicago detective, relying on a warrantless administrative search provision similar to that involved in this case, conducted a warrantless search. The very next day, a federal district court ruled, in an unrelated case, that the search provision in question was unconstitutional. The Supreme Court based its holding on the officer's good faith reliance on the statute.

The facts in Krull are similar to the case before us today. Agent Holmes made his warrantless entry onto Appellant's land in

reliance upon Section 608 of the Act, which, at the time of Holmes' entry, was presumed to be constitutional.[6] See Department of Environmental Resources vs. Blosenski Disposal Service, _____Pa. Cmwlth.Ct._____, 532 A.2d 497 (1987) (Blosenski II). Therefore, we believe that Agent Holmes' entry onto

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[6] In Commonwealth vs. Lutz, 512 Pa. 192, 516 A.2d 339 (1986), our Supreme Court held that administrative warrantless search provisions were unconsitutional when nonhazardous wastes were involved. It was not until the Lutz opinion was filed, however, that the constitutionality of Section 608 of the Act was questioned. Agent Holmes' entry onto Appellant's land in July, 1981, took place approximately five years prior to the decision in Lutz. The United Stated Supreme Court, on March 24, 1987, granted DER's petition for a writ of certiorari and vacated judgment in Lutz remanding the case for consideration in light of United States vs. Dunn, _____U.S._____, 107 S.Ct. 1560 (1987). Upon remand, the Pennsylvania Supreme Court remanded the case for further proceedings in light of Dunn; Commonwealth vs. Lutz, _____Pa._____, _____A.2d _____(No. 59 W.D. Docket 1985, filed March 21, 1987).

Appellant's property was permissible under Krull and, hence, that his observations and testimony were properly admitted by the trial court.

Additionally, even if Krull were not dispositive of the issue, we believe that Agent Holmes' actions cannot be held unconstitutional in light of United States vs. Dunn, _____ U.S. _____, 107 S.Ct. 1134 (1987). In Dunn, the Court, relying upon its own precedent, stated that warrantless naked-eye observations of an area protected by the Fourth Amendment are not unconstitutional.[7] As Agent Holmes' testimony consisted solely of "naked-eye observations", we believe that his observations were both permissible, and admissible. Id.

---

[7] Dunn, as here, involved entry onto a large tract of land and naked-eye observations of illegal drug activities within a building; these observations were made without entry into the building.

JUDGMENT OF SENTENCE IN QUESTION

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	IN THE COURT OF COMMON PLEAS, CHESTER COUNTY, PENNSYLVANIA
VS.	:	NOS. 183-82, 184-82
BLOSENSKI DISPOSAL SERVICE	:	SUMMARY APPEAL

JUDGMENT OF SENTENCE AND ORDER

AND NOW, this 30th day of March, 1987, Defendant having been adjudicated guilty of two summary offenses, citation numbers 22719 and 22721 respectively and post-trial motions having been denied, the following sentences only are imposed:

On citation 22179, a fine of $500.00 plus record court costs of $17.50 and;

On citation 22721 a fine of $500.00 plus record court costs of $17.50.

Further, Defendant shall be entitled to credit

upon such sums for any fine or costs paid heretofore in these matters to the district justice and/or Clerk of Courts and shall have seven days following entry of this Order upon the docket to pay all remaining fines and costs.

Defendant having indicated its intention to appeal and upon such appeal being duly filed within time and manner required by law and court rule, said appeal shall be a supersedeas and stay of sentence as provided by the Pennsyvlania Rules of Appellate Procedure, until, if and when sentence is affirmed by final appellate court order if defendant has, within the time provided herein, paid into the Chester County Clerk of Court, the amount of the total fine and costs imposed plus an additional 20%.

Commonwealth's request for direction of payment by the Clerk of Courts of the fines herein to the Treasury of the Commonwealth

of Pennsylvania "Solid Waste Abatement Fund" is approved and the Clerk of Courts is so directed at such time as said fine is disbursed.

BY THE COURT:

/s/ John E. Stively, Jr.
S.J.

Certified From the Record
This 31st day of March,
1987
Debra L. Klinger
Deputy Clerk of Common
Pleas Court

1/30/87

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS OF CHESTER COUNTY, PENNSYLVANIA
VS.	:	NOS. 183-82, 184-82
BLOSENSKI DISPOSAL SERVICE	:	CRIMINAL ACTION

OPINION

Defendant's third assignment of error involves the admissibility of Agent Holmes' testimony as to what he observed on July 7, 1981. Essentially, defendant contends that Agent Holmes had no right to enter onto its property on that date and his testimony should therefore have been suppressed at trial. This argument too, is meritless.

As a general rule, warrantless inspections under Sections 104(7) and 608(3) of the Solid Waste Management Act are no longer

APPENDIX G

constitutionally permissible as a result of the recent Supreme Court decision in Commonwealth vs. Lutz,_____Pa._____,_____A.2d_____, Slip Opinion 10/17/86 No. 59 Western District 1985. This is in keeping with the Fourth Amendment of the United States Constitution, which was designed to safeguard against unreasonable searches and seizures. However, it is still the law that a person may voluntarily waive his Fourth Amendment rights by giving consent to a search of his premises, and it is in this manner that warrantless searches can be validated. Commonwealth vs. Netting, 315 Pa. Super., 236, 461 A.2d 1259 (1983); Commonwealth vs. Walsh, 314 Pa. Super., 65, 460 A.2d 767 (1983).

In the instant case, Agent Holmes simply drive onto defendant's property during normal, working hours, exited his automobile and entered the compactor building. Although all

activity around the truck stopped at that time, there is no evidence that anyone attempted to stop Mr. Holmes from entering the building, nor is there any indication that Mr. Holmes took any kind of affirmative action to uncover any evidence other than merely observing what was in the back of the truck and in the compactor pit. (N.T. 10/27/83, 15-17, 32-33, 53-54). Furthermore, when Agent Holmes informed the proprietor of BDS, Joseph Blosenski, Jr. that his sole purpose in going out to BDS that day was to make sure that the transfer station was not in operation, Mr. Blosenski responded, "is that all?" and then left. (N.T. 10/27/83, 33-34). In so doing, Mr. Blosenski implictly consented to Agent Holmes' presence on the property and it was for this reason that we denied the motion to suppress Mr. Holmes' testimony concerning the conditions which he observed there that day. See also: United States vs. Mendenhall, 446 U.S. 544 (1980).

Consequently, we find no error in the admission of that testimony and, for all of the foregoing reasons, we now enter the following:

IN THE COURT OF COMMON PLEAS OF
CHESTER COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	NOS 018382 and 018482
VS.	:	
BLOSENSKI DISPOSAL SERVICE	:	SUMMARY APPEAL

MOTION FOR NEW TRIAL AND IN ARREST OF JUDGMENT

4. The learned Trial Court erred in failing to suppress by pre-trial proceeding or as objections were made and continued during the course of trial testimony of Frank Holmes resulting from an unreasonable and unlawful search and without probable cause or warrant.

IN THE COURT OF COMMON PLEAS OF
CHESTER COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : NO. 183-82

VS. : NO. 184-82

BLOSENSKI DISPOSAL SERVICE :

Courtroom No. 5
Chester County Courthouse
West Chester, Pennsylvania
Thursday, October 27, 1983

BEFORE: THE HONORABLE JOHN E. STIVELY, JR., JUDGE

APPEARANCES:

KENNETH A. GELBURD, ESQUIRE
On behalf of the Commonwealth

JAMES A. CUNNINGHAM, ESQUIRE
On behalf of the Defendant

MICHAEL G. GRAJCAR, JR.,
Office Court Reporter

APPENDIX I

court your physical movements on the day of July 7, 1981?

A. My first physical movements. I was in--I was in the state car and I was driving down--I was driving down Chestnut Tree Road and I was going north on Chestnut Tree and at approximately 1:10, 1:15 I pulled into the entrance of the transfer station.

THE COURT: I am assuming that's P.M., sir?

THE WITNESS: Yes, sir.

BY MR. GELBURD:

Q. And the entrance is marked on C-1 as entrance?

A. Yes, it is.

Q. Okay. why did you pull in?

MR. CUNNINGHAM: Objection.

THE COURT: No. I'm going to permit that, Mr. Cunningham. Overruled.

BY MR. GELBURD:

Q. Go on, Mr. Holmes.

A. I pulled in at the time to check to see if the--to see if the transfer station was in operation.

MR. CUNNINGHAM: Your Honor, I object. I move to strike that part of the suppression testimony.

THE COURT: As to why he went in?

MR. CUNNINGHAM: Yes. That would be

correct Your Honor.

THE COURT: I don't see that, sir. He hasn't yet given the result of any search that you claim is unlawful. I think he is permitted to say why he turned in. Overruled.

BY MR. GELBURD

Q. And why would you want to check whether the transfer station was operating, Mr. Holmes?

A. Well, the transfer station did not have a permit by the Department and it was--it was suspected that it was operating without a permit.

Q. And, in the course--what does that have to do with the course of your duties as a solid waste specialist?

A. My course--in my duties are to enforce the Department's rules and regulations. And, this transfer station did not have a permit.

THE COURT: Sir, what was the basis of your belief that that station was operating?

THE WITNESS: It had been observed previously operating.

THE COURT: And reported to you?

THE WITNESS: I had personally seen it operating, sir.

THE COURT: All right. How many days before July 7th, 1981 had you seen it in operation?

THE WITNESS: Excuse me, Your Honor, but I don't remember. It was probably a month or two. I don't have the exact date.

THE COURT: And when you observed it in operation, did you enter the property or did you simply view it from the road?

THE WITNESS: I entered the property, Your Honor.

THE COURT: All right. Go ahead, Mr. Gelburd.

BY MR. GELBURD:

Q. Well, what did you do then after you pulled up?

A. When I--as I pulled in, I--I--I pulled into or next to the compactor building which is on C-1 to the right hand side. I pulled on--on the right hand side of the ramp, the ramp that goes up into the actual compactor building where the compactor is located for the access to the compactor if located.

I observed--

MR. CUNNINGHAM: Objection Your Honor. Observation would be part of the suppression.

THE COURT: We are getting into the issues, aren't we Mr. Gelburd, now?

All right. Mr.Holmes, why don't you step down from the stand while I hear what counsel has

to say here.

Now, state the basis of your objection again, Mr. Cunningham.

(Whereupon argument was heard on the objection.)

THE COURT: All right. Mr. Cunningham, your objection is overruled. We will permit this testimony.

You can retake the stand, Mr. Holmes.

thrown into and compacted slightly. At this time, it was backed in. I think it was truck No. 62. I believe it was. It was backed into--it was backed into the compactor building. And, there was trash down in the compactor hopper. If you will refer to my drawing--

THE COURT: Is that the truck?

THE WITNESS: to the front view. There was--there was trash down inside of the--of the compactor itself. And, there was also trash in the back of the truck.

THE COURT: Tell me, Mr. Holmes, if you can, how the--in this instance a transfer was being made from the truck to the compactor?

THE WITNESS: Well--

THE COURT: In other words, is it simply dumped into the compactor?

THE WITNESS: Inside of the truck, they have a hydraulic--they have a hydraulic ramp that actualy physically pushes the trash out of

thrown into and compacted slightly. At this time, it was backed in. I think it was truck No. 62. I believe it was. It was backed into--it was backed into the compactor building. And, there was trash down in the compactor hopper. If you will refer to my drawing--

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THE COURT: Tell me, Mr. Holmes, if you can, how the--in this instance a transfer was being made from the truck to the compactor?

THE WITNESS: Well--

THE COURT: In other words, is it simply dumped into the compactor?

THE WITNESS: Inside of the truck, they have a hydraulic--they have a hydraulic ramp that actualy physically pushes the trash out of

the truck and at that time it falls into the compactor hopper, where then it again is compacted again by a hydraulic--by a hydraulic ram into a transfer trailer.

20 a

Q. Mr. Holmes, have you finished your narrative of

36 a

the events of July 7th, 1981 at the Chestnut Tree Road site?

A. To--to go on with that, as--as I was walking from the car into the--into the com- into the compactor building, all the activity stopped that was taking place around the truck.

Q. And, what activity was that?

37 a

A. Well, there were the driver and I assume it was the helper. There were two, two people with the--with the actual truck. They were--one of them, I believe, was just somehow standing on the side of it, the bumper or whatever. And, they stopped and came forward to the front of the truck.

The person in the--the individual that was in the--that was in the control booth, he made a phone call, and I can only presume that he called Joseph Blosenski, Jr.

MR. CUNNINGHAM: Objection.

THE COURT: You better hadn't tell us that, sir.

THE WITNESS: Okay. Anyway, a few minutes after I had arrived--

THE COURT: Before you leave that point, Mr. Holmes, you said as you came up the activity stopped. Do you have any reason to believe the activity stopped because you were there?

THE WITNESS: It--it usually does when I--

THE COURT: Well--

MR. CUNNINGHAM: Objection, Your Honor.

THE COURT: We will strike that answer.

Did they turn and look towards you, see--

THE WITNESS: They did, Your Honor.

THE COURT: --see that you were coming? How close did you get before activity stopped?

THE WITNESS: I got out of the car and I was walking, oh, a few yards, five yards.

THE COURT: Is your car marked in any way to designate your position or your Department?

THE WITNESS: No it isn't.

THE COURT: Did you have any uniform on or--

THE WITNESS: No, Your Honor.

THE COURT: Had you ever seen either of these two men before?

THE WITNESS: I don't believe so, Your Honor.

THE COURT: All right, sir. Go ahead.

THE WITNESS: After I had been there a few minutes in the compactor building, Joseph Blosenski, Jr. arrived in his car--truck. He asked me why I was there.

And, I explained to him that I was there to make sure that the transfer station was not in operation.

He said: Is that all?

And I said: yes.

And then he just left.

THE COURT: Excuse me. He said: Is that all and you said: Yes, and that's all and then he said nothing more?

THE WITNESS: Right.

THE COURT: All right.

BY MR. GELBURD:

Q. Please go on, Mr. Holmes.

A. Since--since--since there--since there seemed to be that there wasn't anything going to be happening while I was standing there, I got in my car and I left.

BY MR. CUNNINGHAM:

Q. Let me ask you then what--you didn't say anything about hearing the sound of cans; is that correct, once you changed your testimony?

A. I said I saw them.

Q. Okay. You saw cans dropping; is that your testimony?

A. No, that isn't.

Q. You did not see any cans dropping?

A. No, I didn't.

Q. Did you see anything dropping?

A. No, I didn't.

Q. All right. So there were--there was, according

to your testimony, some green bags in the compactor and some green bags in the trash truck?

A. Yes.

Q. Nothing was moving from the trash truck to the compactor, correct?

A. Correct.

Q. Okay. And about how many green bags were in the trash truck?

A. No way to tell. I have no idea of the depth of which the trash was in the truck.

Q. How many did you see?

A. Maybe--maybe visible, 10, fifteen, possibly.

Q. And, when was the first time that you saw them?

A. When I walked to the back--to the rear of the truck, looked into the back of the truck and into the compactor hopper.

Q. This was by the time you had entered the entire site, entered the building, went past the truck and walked back towards the end of the truck; is that correct?

A. That's correct.

Q. All right. You did not see the contents of the green bags; is that correct?

A. No, that's not correct. There were some-- there was some loose trash along with the green.

Q. All right. But, you did not see the contents of

the green bags?

A. No, I did not.

Q. Now, isn't it true that C-1 does not show either the entire site on Chestnut Tree Road and does not show all of the buildings on Chestnut Tree Road?

A. That's true.

Q. Okay. And it's also true that the entrance does not come in directly from Chestnut Tree

Road on a 90 degree angle; isn't that correct?

A. Upon entering on that road, you can see the transfer building.

Q. No. I didn't ask you that.

A. Almost directly ahead of you.

Q. But, that wasn't my question. My question--

A. Is it directly--directly ahead of the entrance road?

Q. Yes.

A. No, not exactly.

Q. And it's true that the entrance from Chestnut Tree Road is to the north of the building and that you actually wind in from the left to the right?

A. You--you wind very slightly to the right in order to get to the foot of the ramp to drive up; this is true. But, you are looking at the building as you come in.

Q. Okay. But, you can't see the front of the building flush from the entrance?

A. You can't see the front of the building flush from the entrance?

Q. Isn't that correct?

A. That's correct.

Q. And, in fact, you can only see only a very small portion of the area marked ramp on C-1 from the entrance?

A. Are you speaking from Chestnut Tree Road or are you speaking of from somewhere in from Chestnut Tree Road?

Q. From the--from the location that you have on C-1 showing the intersection of the entrance and Chestnut Tree Road.

A. Right.

Q. All right.

A. Well, that is--that is true. You only see a small part of the ramp.

Q. Now, you testified that about a month before July 7, 1981 you saw something occurring on that site; is that correct?

A. It was probably longer than 30 days.

Q. Longer than 30 days. All right. Now, what exactly did you see?

A. Solid waste specialist, a fellow named--let's see--Steel, James Steel and I made an inspection. He was showing me the field area that I was to take over. He was giving me more or less on-the-job--on-the-job instructions. And, we both saw that the--that the--that the transfer station was in operation. And, we talked to Mr. Blosenski about that fact.

THE COURT: That what was in operation, sir?

THE WITNESS: The transfer station. There was a--there was a truck.

BY MR. CUNNINGHAM:

Q. Go ahead.

A. There was a truck there. There was a trash truck there. We saw that it was in operation.

Now, I didn't get--I was being trained, more or less. I didn't get exact notes on what was happening, but--

Q. All right. Now when you say operation, you saw a truck backed into the ramp; isn't that correct?

A. That's correct.

Q. All right. And that's all you saw?

A. Right.

Q. All right.

THE COURT: Now you are talking about the earlier time?

THE WITNESS: That's right. This is the time before.

IN THE COURT OF COMMON PLEAS OF
CHESTER COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : CASE NO. 183, 184-82

VS. :

BLOSENSKI DISPOSAL SERVICE :

DEFENDANT'S PETRIAL MOTIONS

1. Defendant moves to suppress testimony relating to or stemming from a search believed unlawful and without probable cause believed to have occurred on or about July 7, 1981.

2. Defendnat moves to dismiss the citations because they were issued and/or filed in violation of Pa. R.Crim.P. 51.

3. Defendant moves to dismiss the citations because they are defective on their face, i.e., both fail to allege unlawful activity under the sections of statute charged and Citations 22719 charges "2nd unlawful" which does not exist in the law.

APPENDIX J

4. Defendant moves for non-pros for failure of the District Justice to return the transcript to the Clerk of Courts within 20 days of receipt of the notice of appeal.

RESPECTFULLY SUBMITTED,

James A. Cunningham, Esq.
Atty. I.D. #17459
Attorney for Defendant